Filed 12/2/04 P. v. Munoz CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE ,	F043611
Plaintiff and Respondent,	(Super. Ct. No. 94667)
v.	
HECTOR MUNOZ,	**O P I N I O N**
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Hector Munoz was convicted after jury trial of conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379.6);[1] manufacturing methamphetamine (§ 11379.6, subd. (a)); permitting production of methamphetamine on property he controlled (§ 11366.5, subd. (a)); and child endangerment (Pen. Code, § 273a, subd. (a)). The jury also found true enhancement allegations attached to counts 1 and 2 that substances containing methamphetamine exceeded 10 pounds of solid substance by weight or 25 gallons of liquid by volume, within the meaning of section 11379.8, subdivision (a)(3) (the quantity enhancement).

Munoz argues that the child endangerment, conspiracy, and manufacturing convictions are not supported by substantial evidence. He also contends the trial court erred in instructing the jury on the quantity enhancement. We agree that the jury was prejudicially misinstructed on the substantial involvement element of the quantity enhancement that was attached to the conspiracy offense (count 1). The rest of defendant's arguments are unpersuasive.

FACTUAL AND PROCEDURAL SUMMARY

Trial evidence proved that a methamphetamine lab was being operated in an inoperable bus that was parked on the property where Munoz and codefendant Salvador Jimenez Ceja lived together with Munoz's wife and children and Ceja's girlfriend, Martha Ortega, and her children. Police officers and criminalists testified that all the necessary equipment and many of the chemicals and ingredients necessary to produce

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

We note the abstract of judgment incorrectly states that Munoz was convicted in count 2 of violating section 11379.

methamphetamine were on the property. In addition, the police found over 40 gallons of liquid and 10 pounds of solid substance associated with the production of methamphetamine. Expert testimony placed the street value of the methamphetamine in production, if completed, at almost $7 million.

Munoz and Ceja did not dispute these facts but instead tried to distance themselves from the lab. Munoz claimed he was forced to permit the lab on the property by some unknown Mexican men who threatened him with guns. Ceja claimed he was a guest on the property, stayed there only part time, and did not have any connection with, or control over, anything that occurred on the property.

Munoz and Ceja were charged with conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1); § 11379.6)--count 1; manufacturing methamphetamine (§ 11379.6, subd. (a))--count 2; permitting production of methamphetamine on property controlled by the defendants (§ 11366.5, subd. (a))--count 3; and felony child endangerment (Pen. Code, § 273a, subd. (a))--count 4. Counts 1 and 2 also alleged that substances containing methamphetamine were found to exceed 10 pounds of solid substance by weight or 25 gallons of liquid by volume, within the meaning of section 11379.8, subdivision (a)(3). Count 2 also charged an enhancement for producing methamphetamine in a structure where a child was present, within the meaning of section 11379.7, subdivision (a). The trial court granted a motion to dismiss this enhancement after the prosecution rested. The jury convicted Munoz on all counts and found all enhancements true. Munoz was sentenced to the midterm of five years on count 1 plus an additional 10 years for the quantity enhancement attached to this count, and a consecutive term of 16 months on count 4, for a total term of 16 years and four months.

The remaining counts and enhancements were either stayed pursuant to Penal Code section 654 or were sentenced concurrently.[2]

DISCUSSION

I. Counts 1, 2 and 4 have adequate evidentiary support.

Our review of the sufficiency of the evidence is deferential. We "'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) "The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances

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[2] Ceja was charged in counts 5 and 6 with two additional crimes, possession of methamphetamine and being under the influence of methamphetamine. (§§ 11377, subd. (a), 11550, subd. (a)). He was found guilty of counts 1, 4, 5 and 6. The quantity enhancement attached to count 1 was found to be not true. He admitted a prior conviction for possession for sale of narcotics.

might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]' [Citation.] '"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

A. Conspiracy to Manufacture Methamphetamine (count 1)

Munoz was convicted in count 1 of conspiring with Ceja and others to manufacture methamphetamine.

> "Pursuant to [Penal Code] section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy. [Citations.] [¶]…
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> """'In contemplation of law the act of one [conspirator] is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences ….'"" [Citations.] Thus, '[i]t is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts.' [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403, 416-417, fns. omitted.)

"To sustain a conviction for conspiracy the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense. [Citation.] In proving a conspiracy, however, it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before

and during the alleged conspiracy. [Citation.]" (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) "While 'mere association' cannot establish a conspiracy, '[w]here there is some evidence of participation or interest in the commission of the offense, it, when taken with evidence of association, may support an inference of a conspiracy to commit the offense.' [Citation.]" (*Id*. at p. 1400.)

Munoz argues there was no evidence proving that he was a participant in this conspiracy, i.e., that he entered into an agreement with anyone to manufacture methamphetamine. We disagree.

There is overwhelming evidence of a conspiracy to manufacture methamphetamine. The undisputed testimony is that at least five to eight individuals participated in the manufacturing process. These individuals must have agreed to manufacture methamphetamine, thus establishing a conspiracy. Munoz's conduct provides ample evidence of his agreement and participation in this conspiracy. Ortega testified at trial that she argued with Munoz about the odors emanating from the bus and was stopped by Munoz when she tried to approach the bus. When Ortega reached the shop, she was chased away by a man who shot at her. Munoz appeared out of the trees and stated that the shots were intended for Ortega. When arrested, Munoz stated he was responsible and that his family was not involved. He admitted taking a propane cylinder and two white buckets out of the lab and placing them in the orange grove. He also was able to describe what was inside of the bus. Munoz also told Ortega where 15 pounds of drugs were hidden on the property. Ortega relayed the information to the police. A search of the property revealed an empty hiding place. The officers also found Munoz's fingerprints on one of the Coleman fuel cans used in the manufacturing operation. This evidence is more than sufficient to support the conviction. We do not reweigh the evidence, as Munoz would have us do, nor determine if other inferences could have been drawn from the evidence. (*People v. Stanley, supra,* 10 Cal.4th at pp. 792-793.)

Munoz points out that there was no direct evidence that he reached an agreement with anyone to manufacture methamphetamine. Such evidence is unnecessary. Conspiracy may be proved through circumstantial evidence and inferred from the conduct of the parties. (*People v. Prevost, supra,* 60 Cal.App.4th at p. 1399.)

Munoz also contends there was no evidence that he possessed items for the manufacture of methamphetamine or allowed other coconspirators to use the property. This argument, of course, misconstrues the law. The evidence sufficiently proves that Munoz was a participant in a conspiracy to manufacture methamphetamine. Whether Munoz actually possessed the items to manufacture methamphetamine or permitted the property to be used for this purpose is immaterial. As long as one coconspirator did these things, all members of the conspiracy are responsible for the acts. (*People v. Morante, supra,* 20 Cal.4th at p. 417.)

B. Manufacturing Methamphetamine (count 2)

Munoz contends there was insufficient evidence proving that he manufactured methamphetamine. To resolve this claim, we must determine whether the People established that Munoz participated in the manufacturing process and that he realized the product being produced was methamphetamine. (*People v. Coria* (1999) 21 Cal.4th 868, 874.) There was more than substantial evidence to establish both of these elements.

There was undisputed evidence that a methamphetamine manufacturing operation was being run on property controlled by Munoz. Those who participated in the manufacturing process had the clear intention to manufacture methamphetamine. When Munoz was first detained, he accepted full responsibility for what was occurring on the property, stating his family was not involved. He was able to describe the interior of the lab. Numerous empty Coleman fuel cans used in the manufacturing process were found in a truck owned by Munoz. His fingerprints were found on one of these cans. Munoz admitted he removed items from the lab and deposited them in the surrounding orchard.

Munoz's knowledge of what was occurring on his property was established by his admission and by his subsequent instruction to Ortega while both were in custody. Ortega told officers that, while on the bus ride returning to the detention facility after a court appearance, Munoz told her where to find 15 pounds of methamphetamine hidden on the property. Munoz's instructions were to get the drugs, sell them, and pay him when he was released from prison. The hiding place for the methamphetamine was behind the workshop in a hole in the ground underneath an empty 55-gallon barrel. When authorities returned to the property to search for the methamphetamine, they found the hiding place, but any methamphetamine that had been hidden there had been removed.

C. Child Endangerment (count 4)

Penal Code section 273a, subdivision (a), criminalizes four types of conduct as child abuse or endangerment, i.e., a violation occurs if (1) a person willfully causes or permits a child to suffer unjustifiable pain or suffering in circumstances or conditions likely to produce great bodily harm or death; (2) one inflicts unjustifiable physical pain or mental suffering on a child; (3) one having the care or custody of a child willfully causes or permits the person or health of the child to be injured; or (4) one having the care or custody of a child willfully causes or permits the child to be placed in a situation where his or her person or health is endangered. (Pen. Code, § 273a, subd. (a); *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) Since there was no evidence that a child was injured, Munoz could be convicted of this offense only if he had care or custody of a child and willfully caused or permitted him or her to be placed in a situation where his or her life or health was endangered.

"Violations of [Penal Code] section 273a, subdivision (a) can occur in a wide variety of situations. [Citation.] 'The number and kind of situations where a child's life or health may be imperiled are infinite.… Thus, reasonably construed, the statute condemned the intentional placing of a child, or permitting him or her to be placed, in a

situation in which serious physical danger or health hazard to the child is reasonably foreseeable.' [Citation.]" (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479.) The term "willfully causes," as used in Penal Code section 273a, includes criminally negligent conduct. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-788.) "Criminal negligence is '"aggravated, culpable, gross, or reckless … conduct … [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life …."' [Citation.] 'Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness."' [Citations.] Under section 20, criminal negligence 'may be sufficient to make an act a criminal offense, without a criminal intent.' [Citation.]" (*Id*. at p. 783.)

Munoz does not dispute that a methamphetamine lab was operated on the property but asserts there was no evidence that the children ever were exposed to the dangers associated with a methamphetamine lab. He also argues there was insufficient evidence to establish that he knew manufacturing methamphetamine was dangerous. Neither argument is persuasive.

Ortega testified the children generally were not permitted to play in the shop area where the methamphetamine was being produced. However, she also testified that the children were allowed to ride their bikes among the orange trees surrounding the house. Munoz admitted he placed methamphetamine by-products, which the testimony established were dangerous, among the orange trees. Therefore, there is substantial evidence that the children had access to dangerous chemicals. In addition to the potential exposure to the chemicals, experts testified that, at several different stages of methamphetamine production, an explosion could occur. Every child was at risk of injury from an explosion. Furthermore, Ortega testified that, when she looked inside the shed, one of the men shot at her, at least once, possibly twice. Thus, the men

manufacturing the methamphetamine were armed and willing to shoot at people to protect their product. Again, the children were at risk of harm if they strayed into the shed or were in the path of a stray bullet while these men were attempting to protect their product. These facts establish the children were in danger, regardless of whether they played in the area where the actual manufacturing occurred.

We also reject Munoz's claim that he did not know manufacturing methamphetamine was dangerous. First, we apply an objective standard, not Munoz's claimed subjective belief. (*People v. Valdez, supra,* 27 Cal.4th at p. 783.) The fact that eight strangers began working around an abandoned bus, some of whom were armed, producing fumes that Ortega described as "go[ing] right through your nose and all the way to the back of your head," would lead an ordinary, reasonable person to believe something dangerous was happening. Munoz's claim that he was forced to permit the methamphetamine operation on his property by armed gunmen also would lead an ordinary, reasonable person to believe the men were doing something illegal, and probably dangerous.

II. The jury was not misinstructed on the weight element of the quantity enhancement attached to counts 1 and 2 but it was misinstructed on the substantial involvement element of the quantity enhancement attached to count 1.

Section 11379.8, subdivision (a)(3) provides for an additional term of imprisonment if the substance containing methamphetamine exceeds "25 gallons of liquid by volume or 10 pounds of solid substance by weight." Subdivision (e) of this section provides, "The conspiracy enhancements provided for in this section shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense."

The trial court utilized CALJIC No. 17.21 to instruct on the quantity enhancement that was attached to counts 1 and 2. The clerk's transcript version reads:

> "It is alleged [in Count[s] 1 and 2] that at the time of the commission of the crime of which the defendant is accused, [he][she] manufacture[d] or conspire[d] to manufacture a substance containing methamphetamine which exceeded 10 pounds or [25 gallons by liquid volume].
>
> "If you find the defendant guilty of the crime charged [in Count ___], you must determine whether this allegation is true.
>
> "[If you find the defendant guilty of the crime of conspiracy to commit manufacture of methamphetamine involving a substance containing _____ which exceeds 10 gallons, an essential element of this allegation is that the defendant _____ was substantially involved [in the planning, direction, execution, or financing of the conspiracy and its objective.] [in the direction or supervision of, or in a significant portion of the financing of, the underlying crime.]]
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> "The People have the burden of proving the truth of this allegation [and each of its elements.] If you have a reasonable doubt that it is true, you must find it to be not true.
>
> "Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

The trial court read this instruction to the jury, as follows:

> "Now, it's alleged with respect to Counts 1 and 2 that at the time of the commission of the crime of which the defendant is accused, a substance containing methamphetamine -- let's start over again. It's alleged in Counts 1 and 2 that at the time of the commission of the crime of which defendant is accused he manufactured or conspired to manufacture a substance containing methamphetamine which exceeded ten gallons by liquid volume.
>
> "Now, if you find the defendant guilty of the crime charged in Counts 1 or 2 you must determine whether this allegation is true. Now, if you find that the defendant is guilty of the crime of conspiracy to commit manufacture of methamphetamine involving a substance containing methamphetamine exceeding ten gallons, an essential element of this allegation is that the defendant was substantially involved in the planning, direction, execution, financing of the conspiracy, and its objective or in the

> direction of, supervision of, or in the significant portion of the finance of the underlying crime. The People have the burden of proving this beyond a reasonable doubt."

A bench conference was held after the trial court read the instructions, but before the jury began deliberations. The trial court then clarified the quantity required in order to find this enhancement true, orally instructing the jury, "The special allegation to Counts 1 and 2 as to quantity is … ten pounds … [¶]…[¶] … or 25 gallons."

The verdict form read that to find the special allegation true, the jury must find the defendant possessed methamphetamine that exceeded either 25 gallons of liquid by volume or 10 pounds of solid substance by weight.

A. There was no instructional error with respect to the weight element.

Munoz argues that the jury was misinstructed on the required quantity of material. He points out that the third paragraph of the written instruction erroneously states that the enhancement may be found true if there were "10 gallons" of substance found on the property and when the trial court read the instruction, it recited the erroneous "10 gallons" figure. This argument fails because the trial court corrected the defective instruction prior to commencement of deliberations by correctly informing the jury that the correct quantity is 10 pounds or 25 gallons. Also, the jury verdict form correctly provided that to find the special allegation true, the jury must find the defendant possessed methamphetamine that exceeded either 25 gallons of liquid by volume or 10 pounds of solid substance by weight. Thus, potential instructional error was averted. It is presumed that jurors understand and follow the instructions given to them. (*Francis v. Franklin* (1985) 471 U.S. 307, 325, fn. 19; *People v. Beach* (1983) 147 Cal.App.3d 612, 637.) Thus, we presume that they understood and followed the trial court's oral direction that the proper quantity is 10 pounds or 25 gallons. Reasonable jurors would understand that 10 pounds refers to dry weight and 25 gallons to liquid volume. Jurors are presumed to be reasonably intelligent people. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

In any event, the alleged error was nonprejudicial. Evidence of quantity was not contested at trial. The undisputed testimony was that the liquid substance containing methamphetamine recovered from the property exceeded 40 gallons and the solid substance containing methamphetamine weighed 13.3 pounds. Thus, even if there was error, it was harmless beyond a reasonable doubt. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193-195.)

B. There was prejudicial instructional error concerning the requirement that the conspirator in a manufacturing conspiracy must be substantially involved in the direction, supervision or a significant portion of the financing of the underlying offense (quantity enhancement attached to count 1).

Subdivision (e) of section 11379.8 applies to conspiracies to manufacture certain controlled substances, including methamphetamine, and is applicable to the manufacturing conspiracy charged in count 1. This subdivision provides, "The conspiracy enhancements provided for in this section shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense." However, when a defendant is charged with conspiracy to possess, sell, or transport a controlled substance such as methamphetamine, a quantity enhancement may be imposed pursuant to section 11370.4 if "the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense." (§ 11370.4, subd. (a).) Thus, the quantity enhancement for conspiring to manufacture is narrower than the quantity enhancement for conspiring to possess for sale. The former is limited to participants in the conspiracy who are substantially involved in the direction or supervision of the manufacturing process or who provide a significant portion of the financing. In a conspiracy to possess for sale, the enhancement applies if a participant in the conspiracy is substantially involved in the planning, direction, execution, or financing of the venture.

CALJIC No. 17.21 is used for the enhancements found in sections 11379.8 and 11370.4. The Use Note to CALJIC No. 17.21 explains that there is a difference in the conspiracy requirements for two enhancements and instructs the user to eliminate the portion of the instruction that does not apply to the charged enhancement.

People v. Duran (2001) 94 Cal.App.4th 923 (*Duran*) held that it was erroneous to instruct with the language of the possession for sale enhancement when the defendant has been charged with conspiracy to manufacture because the enhancement for conspiring to manufacture is narrower than the enhancement for conspiring to possess for sale. (*Id*. at pp. 937-943.) We find *Duran* persuasive and will follow its reasoning and result.

In this case, the trial court erred by instructing with the language from both statutes when only section 11379.8 was charged. As a result, the jury could have found the quantity enhancement that was attached to the conspiracy to manufacture methamphetamine count to be true based on a ground that does not satisfy the requirements of section 11379.8, subdivision (e). It could have concluded that Munoz was substantially involved in the planning or execution of the venture or that he was substantially involved in the financing, even though he had not provided a significant portion of the funds. None of these determinations are sufficient.

The Attorney General argues that, unlike *Duran*, the instructional error in this case actually benefited Munoz because, as given, the instruction permitted the jurors to find the enhancement applicable only if they found that Munoz was involved in all of the following: the planning, direction, execution, and financing of the conspiracy. This argument fails because the verbs planning, direction, execution, financing are not separated by the word "and." When reasonably read, jurors would have understood that they could find the enhancement true if they concluded that defendant was substantially involved in any of the following: planning, direction, execution, financing, supervision. This list is broader than the applicable statutory list of direction, supervision or

significant portion of the financing. Therefore, the jury was misinstructed on this element in a manner that operated to Munoz's detriment.

We turn to the question of prejudice. *Duran, supra,* 94 Cal.App.4th 923 is not helpful with respect to the prejudice determination because the appellate court found that prejudice was "manifest" without significant discussion of the point. (*Id*. at p. 942.) Instructional error that "improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element" is reviewed for prejudice under the state constitutional standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818 and under the federal constitutional standard enunciated in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*People v. Flood* (1998) 18 Cal.4th 470, 490, 502-503 [*Flood*].) This prejudice standard applies to the failure to properly instruct on the elements of a sentence enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.) Factors such as whether the misdescribed element was conceded or admitted by the defendant, whether the theories advanced by the district attorney and defense counsel compounded the error, and whether the evidence proving the misdescribed element was so overwhelming that a reasonable juror could not have failed to make the required factual finding are applicable. (*Flood, supra*, 18 Cal.4th at pp. 504-505.)

Since the contested instruction misdescribed an element of an offense, we must determine whether the error was prejudicial under the demanding *Chapman* standard. We conclude it was prejudicial, principally because the prosecutor relied on an improper theory to prove this element. The prosecutor argued that defendant was not a drug kingpin or the major financier. He was the assembler. He made the drug. Thus, the prosecutor maintained he was a principal participant involved in the "execution" of the conspiracy. However, "execution" is not included in the statutory list applicable to a manufacturing conspiracy. Thus, the prosecutor's argument highlighted and compounded the instructional error. Although we believe there is strong proof

establishing that defendant was substantially involved in direction or supervision of the methamphetamine lab, the evidence on this point it is not so overwhelming that we can conclude beyond a reasonable doubt that the instructional error did not affect the verdict, particularly given the prosecutor's reliance on an improper theory to prove this element of the enhancement.[3]

This conclusion does not affect the same enhancement found true on the manufacturing count (count 2) because the requirement that the defendant must have substantial involvement in the direction or control of the operation, or significant portion of the financing, applies only to conspiracy convictions.

DISPOSITION

The true finding on the section 11379.8 enhancement attached to count 1 is reversed. The section 11379.8 enhancement attached to count 2, which was stayed, remains enforceable. The matter is remanded to the superior court for retrial of the

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[3] In the context of the instructional issue, we requested supplemental briefing addressing the quantum of evidence supporting the quantity enhancement attached to the conspiracy count. We decline to find the evidence legally insufficient to support the enhancement. It is supported by the following proof: (1) when arrested, Munoz admitted that he was responsible and stated that his family had nothing to do with the operation; (2) he admitted that he had been inside the bus; (3) he lied to Ortega when she questioned him about the operation and he attempted to restrict her movements on the property; (4) he told Ortega where to find methamphetamine hidden on the property and he instructed her to sell it; (5) he had approximately $1,200 in the house; (6) he had a shotgun in the house; (7) electricity was provided to the bus from the main residence; (8) supplies and debris associated with the production of methamphetamine were located in the shop area and in a truck that Munoz owned; and (9) Munoz's fingerprints were found on a fuel can used in the manufacturing process. From this evidence, a reasonable trier of fact could deduce that Munoz directed or supervised the methamphetamine lab. A reviewing court is to draw all inferences in favor of the judgment and is not to substitute its evaluation of a witness's credibility for that of the trier of fact. (*People v. Kraft, supra,* 23 Cal.4th at p. 1053; *People v. Koontz, supra,* 27 Cal.4th at p. 1078.)

section 11379.8 enhancement attached to count 1 and for resentencing. If the district attorney does not elect to retry this enhancement, then defendant is to be resentenced within 60 days after issuance of the remittitur. The abstract of judgment is to be corrected to reflect that Munoz was convicted in count 2 of violating section 11379.6, subdivision (a). The judgment is affirmed in all other respects.

_____
Levy, Acting P.J.

I CONCUR:

_____
Gomes, J.

CORNELL, J.

I concur in the judgment. I agree there is substantial evidence to support the convictions in counts 1, 2 and 4 and fully join the majority's analysis on those issues. I respectfully disagree, however, with portions of the analysis in part II of the majority opinion pertaining to the Health and Safety Code section 11379.8[1] enhancement.

The majority fully and accurately sets forth the background of the instructions and the applicable law on the section 11379.8, subdivision (a)(3) enhancement. In my opinion, however, no reasonable juror could have understood the incorrect and convoluted instructions that were given by the trial court. The majority concludes that the trial court's final attempt to straighten out the confusion is sufficient. But this lone sentence -- "The special allegation to Counts 1 and 2 as to quantity is … ten pounds[] [¶] … [¶] … or 25 gallons" -- could not, in my opinion, clear up the confusion caused by the numerous errors and inconsistencies in the written and oral version of the instructions.

First, this sentence was given to the jury at the end of all of the instructions. There is only a perfunctory reference to what the trial court was referring. This reference hardly could be considered sufficient when numerous instructions were read to the jury between the enhancement instruction and the final sentence.

Second, it is unlikely the jury understood the section 11379.8 enhancement is a "special allegation." There is no reference to the term "special allegation" in CALJIC No. 17.21, or in the written or oral instructions provided to the jury on this issue. While the trial court and attorneys certainly knew the enhancement was a special allegation, a gigantic leap of faith is required to assume 12 jurors not trained in the law naturally would conclude that this final sentence referred to CALJIC No. 17.21.

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[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

Third, if the jury thought that perhaps the final sentence referred to the section 11379.8 enhancement, which is possible since the instruction and the final sentence both refer to quantities, the written instruction provided no tools to clear up the confusion. The final instruction was not presented to the jury in written form. Review of the remaining written instructions, which were not only wrong but also internally inconsistent, would only exacerbate the confusion.

Fourth, the analysis of the majority also violates the established rule that, when in conflict, the written instructions take precedence over the oral instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1112-1113.) The written instructions and oral instructions were in conflict.[2] Therefore, this rule requires that the written instructions take precedence over the oral instructions. The written instructions were, of course, wrong.

Finally, the jury *never* was instructed properly. Section 11379.8, subdivision (a)(3) imposes an additional term of imprisonment of 10 years when the "substance exceeds 25 gallons of liquid by volume or 10 pounds of solid substance by weight." The brief reference to "10 pounds or 25 gallons" simply does not convey the same information as that contained in the statute. If, as the majority contends, "[r]easonable jurors" would understand that "10 pounds" refers to substance by weight, and "25 gallons" refers to liquid by volume (maj. opn. *ante*, p. 12), the Legislature added much more information to the statute than necessary.[3] It seems entirely possible that one or more jurors could confuse 10 pounds of solid substance with 10 pounds of liquid

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[2] The jury was provided with a written copy of the jury instructions.

[3] Which, I acknowledge, is not impossible.

substance, a quantity significantly less than the 25 gallons of liquid substance required by the statute.[4]

I concur in the judgment, however, because I agree with the majority that the error in instruction was harmless beyond a reasonable doubt. The absence of dispute about the quantity of substance actually found, when combined with the verdict form that correctly states the statutory requirements, convinces me beyond a reasonable doubt that the incorrect instruction did not contribute to the verdict. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193-194.)

I also agree with the conclusion of the majority that the trial court erred in instructing the jury on the section 11379.8, subdivision (a)(3) enhancement on the conspiracy count. The majority correctly points out that the trial court erred when it instructed the jury with language applicable to a section 11370.4, subdivision (a) enhancement, and this error was prejudicial.

Where I differ from the majority is on the question of whether the enhancement is supported by sufficient evidence that Munoz was substantially involved in the supervision, direction, or financing of the manufacturing operation. (§ 11379.8, subd. (e).) Neither attorney argued this specific issue to the jury. Both the prosecutor and Munoz's attorney agreed, however, that Munoz was a small part of the operation.

In their supplemental brief, the People argue the following evidence supports the jury's affirmative finding on the enhancement:

1. When arrested, Munoz stated he was responsible, and his family had nothing to do with the operation;

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[4] One gallon of water weighs approximately eight pounds, and one gallon of gasoline weighs approximately six pounds. The exact composition of the substance in the buckets is unclear, but it is clear that as little as two gallons would weigh more than 10 pounds.

2. Munoz admitted he had been inside the bus;

3. Munoz had approximately $1,200 in the house;

4. Munoz had a shotgun in the house;

5. Electricity was provided to the operation from the main residence;

6. Supplies and debris associated with the production of methamphetamine were located in the shop area and in a truck owned by Munoz;

7. Munoz's fingerprint was found on a Coleman fuel can used in the manufacturing process;

8. Munoz lied to Ortega when she questioned him about the operation; he attempted to restrict her movements about the property;

9. Munoz told Ortega where to find methamphetamine hidden on the property and instructed her to sell it.

In essence, the People argue that since Munoz lived on the property where the lab was located, he must have been the person in control. I do not think the record can be read so broadly.

Munoz's control of the property establishes only that he permitted someone to manufacture methamphetamine on the property. It does not establish that he was in charge of the entire operation.

Munoz's conviction for violation of section 11366.5, subdivision (a) also contradicts the conclusion of the majority. Section 11366.5, subdivision (a) proscribes knowingly permitting land that a person controls to be used for manufacturing, distributing, or storing a controlled substance.[5] The statute is aimed at a defendant who

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[5] Section 11366.5, subdivision (a) states: "Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the

permits others to use his land for illicit purposes. (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1209-1210; *People v. Costa* (1991) 1 Cal.App.4th 1201, 1206-1207.) When the jury convicted Munoz of violating this statute, it necessarily concluded that Munoz permitted the land he controlled to be used *by someone else* for a methamphetamine lab, a conclusion that is inconsistent with supervision, direction, or financing of the manufacturing operation, but is consistent with being a small cog in the manufacturing operation.[6]

Munoz's admitted involvement was limited to removing some items from the lab and hiding them in the orchard surrounding the property. This is not evidence of management of the lab. His admission that he was "responsible," when read in context, is most accurately viewed as an attempt to shield his family from possible prosecution, not an admission that he was responsible for supervision or direction of the lab.

An operational lab necessarily results in items and debris associated with the production of methamphetamine on the property. That these items were on the property again relates to permitting manufacturing of methamphetamine on the property, not supervision of the lab.

Ortega testified she saw some men involved in the production process, but not Munoz. She also was warned by Munoz to stay away from the people working in the lab, and he restrained her on one occasion from going near them. These actions are consistent

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purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in the county jail for not more than one year, or in the state prison."

[6] It is established that one may be convicted of violating section 11366.5, subdivision (a) and of manufacturing methamphetamine under an aider and abettor theory (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923; *People v. Glenos, supra,* 7 Cal.App.4th at p. 1209), a theory that fits the facts and arguments in this case. The jury was instructed on aider and abettor liability.

with someone who rented his property to the lab operators and was trying to ensure their uninterrupted use of the lab. It is also consistent with trying to protect Ortega from the lab operators who, once she interrupted the production process, demonstrated their propensity for violence. These facts simply do not establish that Munoz was directing or supervising the lab.

Perhaps the most damaging evidence was Ortega's testimony that Munoz had instructed her where to find a large quantity of methamphetamine on the property and then instructed her to sell it. When the police attempted to locate the methamphetamine, however, the hiding place was empty. This demonstrates that someone else had the knowledge and access to remove the methamphetamine and was not concerned with Munoz.

I do not think that any of these factors, or all of them considered together, provides substantial evidence that Munoz was substantially involved in the *direction or supervision* of the methamphetamine production.

The People also argue there was evidence that Munoz provided a significant portion of the financing for the operation. I disagree. While Munoz did have $1,200 cash in the residence, this amount hardly would make a dent in the cost of the items associated with the production of methamphetamine found on the premises. One officer testified that the equipment and material found on the premises were valued between $21,000 and $30,000. Moreover, $1,200 seems a paltry amount when the street value of the methamphetamine in production approached $7 million. It seems far more likely that the $1,200, if related to the lab at all, represents payment for renting the premises and for electricity.[7]

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[7] Munoz also operated a vehicle repair business on the property.

For these reasons, I would reverse the true finding on the conspiracy conviction, not only for the error in the instruction but also because there was not substantial evidence to support the finding.

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CORNELL, J.